Filed 4/8/10 In re Hernandez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JESUS CIANEZ HERNANDEZ On Habeas Corpus.	F055656 **O P I N I O N**

ORIGINAL PROCEEDING; petition for writ of habeas corpus.

Michael J. Hersek, State Public Defender, and Jay Colangelo, Assistant State Public Defender, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Lloyd G. Carter and Leslie W. Westmoreland, for Respondent.

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Petitioner Jesus Cianez Hernandez has filed a petition for habeas corpus in this court alleging that during his murder trial the prosecution committed *Brady* (*Brady v. Maryland* (1963) 373 U.S. 83) violations by withholding evidence and giving false testimony regarding an important witness, Anthony Ybarra. Petitioner claims these violations bolstered the credibility of Ybarra, and petitioner is entitled to reversal and retrial of his convictions and the special circumstance.

Statement of the Case and Facts

Petitioner was tried beginning in late 1990 and concluding in early 1991 for the January 4, 1988, first degree murder of Esther Alvarado. He was convicted of one count of murder and one count of conspiracy to commit murder. In addition, a special circumstance of an intentional murder committed for financial gain was found true as to both counts. It was also found by the jury that petitioner personally used a firearm in the commission of the offense. The jury returned a verdict of death, and petitioner appealed to the California Supreme Court.

In 2003 the California Supreme Court struck the financial gain special circumstance based on the conspiracy conviction and affirmed the remaining convictions and special circumstance. The judgment of death was reversed and remanded to the trial court for further proceedings. (*People v. Hernandez* (2003) 30 Cal.4th 835.)

We set forth the facts as summarized by the California Supreme Court in its 2003 opinion.

"A. *Guilt Phase--Prosecution's Case*

"Alfredo Padilla and Brenda Prado were heroin and cocaine dealers who lived in a house in Grayson, a small town in Stanislaus County. Also living in the house (hereafter the Grayson house) were Betty Lawson and her boyfriend, Dallas White.

"The murder victim, Esther 'Cussy' Alvarado, was a heroin addict and prostitute, who would buy heroin from Padilla and Prado and occasionally stay at their house. They later banned her from the house because she had not paid for drugs they had given her, and they suspected she had stolen a radio from the house.

"On January 4, 1988, between 10:30 and 11:00 p.m., Anthony Ybarra (Ybarra) and his brother Gilbert came to the Grayson house. Gilbert, who was drunk, brought a lawn mower that he had stolen earlier in the day from Johnny Alvarado (no relation to murder victim Esther Alvarado) and which he hoped to exchange for drugs. Ybarra also

wanted to buy drugs, but he knew Padilla and Prado would not sell to him because they suspected him of being a police informant.

"When Ybarra and Gilbert arrived at the house, they saw Dallas White outside. Ybarra told White he wanted to buy heroin. While they were standing outside talking, Johnny Alvarado drove up, retrieved his lawn mower from Gilbert, and headed home. Gilbert accompanied him, apparently hoping to persuade him not to report Gilbert's theft of the lawn mower to the police. Ybarra remained outside the Grayson house.

"As Ybarra and White continued their conversation, Ybarra saw defendant, whom he had known for many years, drive up to Guzman's Bar, some 500 feet away. A woman with long hair was with defendant. After dropping off the woman at the bar, defendant drove to the Grayson house. Ybarra feared defendant because, while working for the police, Ybarra had 'set up' the boyfriend of defendant's sister and had testified against him. He therefore hid behind a car as defendant and White entered the house.

"Ten to 15 minutes later, Ybarra saw defendant, Padilla, and Prado go out the back door of the house and enter a small trailer. Ybarra crept through a hole in a fence and peeked through a window of the trailer, hoping to find out where Padilla and Prado hid their drugs so he could steal them. Ybarra heard defendant say, 'that bitch, Cussy [Alvarado]' was waiting for him at Guzman's Bar, and Prado and Padilla complained that Alvarado had 'ripped them off.' Defendant offered to beat up Alvarado, and when Prado and Padilla expressed interest, he said he would kill her 'for the right price.' Prado replied she would give defendant two grams of heroin and an eighth of an ounce of cocaine to kill Alvarado. Defendant said, 'Consider it done,' and he and Padilla shook hands. Defendant, Prado, and Padilla then left the trailer and returned to the house. Shortly thereafter, Ybarra watched as defendant left the house and got in his car, drove back to Guzman's Bar, picked up Alvarado, and drove off with her between 11:30 and 11:45 p.m. Dallas White then gave Ybarra a ride home.

"According to Lorenzo Guzman, the owner of Guzman's Bar, Esther Alvarado left his bar between 11:30 and midnight, after staying 15 to 20 minutes. Guzman saw her enter the passenger side of what he thought was a tan Oldsmobile car.

"Between midnight and 1:00 a.m., Rudy Galvan was driving home from work when he saw a body lying by the road. He drove to Guzman's Bar, about a mile away, and asked Guzman to call the police. Stanislaus County Sheriff's deputies responding to the call found Esther Alvarado's body. She had been shot to death. Alvarado's right fingers were muddy, and what appeared to be scratch marks were in the mud next to her body. A thick track of mud was on the road, made by two wheels of a car.

"Later that night, Homicide Detective Michael Dulaney drove to the nearby town of Patterson. At the home of Guadalupe Porter, defendant's sister, Dulaney saw a black and gold Oldsmobile, which belonged to defendant and his sister. The car had a large quantity of wet mud on the left side and the rear bumper; there also was mud on the gas pedal. On the dashboard was a box of Winchester .22-caliber cartridges. On the floor of the car was a similar .22-caliber bullet, and an expended .22-caliber casing was under the seat. On the ground near the car were two shotgun shell casings. The police entered Porter's house and arrested defendant.

"Later that morning, Deputy Sheriff Richard McFarren questioned defendant. Defendant said that during the previous night he had taken a woman named Ana (identified by other witnesses as Ana Najera) to a motel in Modesto, dropped her off, and returned to his sister's house. He denied going to the Grayson house. When asked about the mud on the car, defendant said that after dropping off Najera, he had driven through mud on his way to the Candyland apartments to buy drugs. He claimed the bullets in the car were there when it was purchased. He did not say when he had bought the car.

"Sheriff's Investigator Mike Clements interviewed Guadalupe Porter, defendant's sister. She said she had borrowed a shotgun and some ammunition from Brenda Prado, but when asked to locate them she could not do so.

"That same morning, Ybarra learned from Esther Alvarado's brother that she had been killed. Sometime later, Deputy David Nirschl questioned Ybarra about the lawn mower his brother Gilbert had stolen from Johnny Alvarado. When Ybarra volunteered that he had information about the murder, Nirschl took him to see Raul DeLeon, one of the deputies investigating the murder. Ybarra told DeLeon that he had overheard defendant, Prado, and Padilla planning to kill Esther Alvarado.

"Dr. William Ernoehazy performed an autopsy on Esther Alvarado. Her body contained a .22-caliber bullet, as well as shotgun pellets, wadding, and a slug. The path of the slug through her body indicated that it had been fired downward into her back at a distance of roughly three feet while she was lying on the ground. Criminalist John Yoshida testified that the copper wash and the design of the bullet found in Alvarado's body were 'exactly the same' as the Winchester cartridges found in defendant's car.

"Shortly after the murder, Brenda Prado moved to Oklahoma, where she lived with her daughter, Valerie Castillo. Three months later, Castillo found a double-barreled sawed-off shotgun hidden in the springs of a couch Prado had brought with her. According to Criminalist Michael White, the two shell casings found in defendant's front yard the morning after Alvarado was killed were fired from this shotgun, the slug found in Alvarado's body was 'probably' fired from the gun's right barrel, and the wadding found in Alvarado's body was 'consistent with' the shells retrieved from defendant's front yard.

"Eleven months after the murder, Deputy District Attorney Michael Stone and District Attorney Investigator Alan Fontes were preparing for the trial of Alfredo Padilla who, like defendant, was charged with Alvarado's murder. Looking closely at a slide projection of Alvarado's body taken at the crime scene, they discovered that what sheriff's deputies had thought to be scratch marks in the mud next to her body were letters spelling 'Jesse' (defendant's first name). According to Dr. Ernoehazy, who

performed the autopsy, Alvarado died some 15 minutes after being shot, and she could have remained conscious long enough to write defendant's name in the mud.

"Deputy Daniel Cron checked defendant's car for fingerprints. On the outside of the passenger's side window he found a latent print that matched Alvarado's right middle finger.[1]

"B. Guilt Phase--Defense Case

"Defendant presented an alibi defense, claiming that someone living at the Grayson house had killed Esther Alvarado and had framed him by writing 'Jesse' in the mud next to Alvarado's body.

"Fifteen-year-old Steven Rodrigues, Guadalupe Porter's son and defendant's nephew, testified that on the night of the murder, defendant left their house shortly after 6:30 p.m. to take Ana Najera home. Defendant returned an hour later and watched television with Steven until about 10:30 p.m., when they fell asleep in the living room. Defendant was still asleep at 6:30 the next morning when Steven, a paper boy, got up to deliver newspapers.

"Steven also testified that Alfredo Padilla and Brenda Prado had come to visit on New Year's Eve (four days before the murder of Alvarado) and Padilla in celebration fired off a sawed-off shotgun in front of the house. According to the defense, this explained the presence of the shotgun shells the police found in front of the house the morning after the murder.

"Defendant's sister, Guadalupe Porter, testified that Esther Alvarado had often been a passenger in defendant's car. That, the defense claimed, explained the fingerprint the deputies had found on the car window.

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1 "Alfredo Padilla and Brenda Prado were tried separately for Alvarado's murder. Padilla was convicted of capital murder and sentenced to death, and we affirmed the judgment. (*People v. Padilla* (1995) 11 Cal.4th 891.)"

"Through testimony of defense witnesses and cross-examination of the prosecution's witnesses, the defense tried to show that Ybarra had left the Grayson house long before defendant arrived there. Therefore, the defense theorized, Ybarra must have made up the conversation in which defendant, Padilla, and Prado discussed killing Esther Alvarado. According to the defense, Ybarra's motivation was to avoid prosecution for helping to steal Johnny Alvarado's lawn mower and to obtain other favors from the Stanislaus County District Attorney's Office. The defense presented evidence of Ybarra's long criminal record for theft and for alcohol and drug-related offenses and the repeated dismissal of these charges by the district attorney's office, possibly in exchange for information. To refute Ybarra's testimony that he no longer used drugs, Donald Yarbary testified that Ybarra had used heroin with him the week before trial.

"The defense also tried to show that no conversation could have occurred in the trailer where, according to prosecution witness Ybarra, he overheard defendant plan to kill Esther Alvarado. Dallas White described the trailer as a 'dump' that 'nobody used.' His testimony was corroborated by Enrique Jiminez, a drug user and frequent visitor to the Grayson house. Tom Lilly, who moved into the Grayson house after Alvarado's murder, described the trailer as 'all caved in, [with] water in it and garbage all the way up.'" (*People v. Hernandez*, *supra*, 30 Cal.4th at pp. 845-849.)

After petitioner was convicted and while his appeal was pending in the California Supreme Court, petitioner's habeas counsel tried to investigate and prepare a habeas petition. Counsel repeatedly sought to review the prosecutor's file and made requests for any evidence favorable to the defense.

On January 1, 2003, new legislation became effective granting the right to postconviction discovery in capital cases. (Pen. Code, § 1054.9.) While petitioner's counsel continued to seek discovery, his two petitions in the California Supreme Court, *In re Jesus Cianez Hernandez*, No. S107230, and *In re Jesus Cianez Hernandez*, No. S117549, were denied on March 2, 2005.

Based on the discovery that was eventually provided to petitioner's counsel, petitioner filed a new petition for writ of habeas corpus in the California Supreme Court on March 7, 2006. (S141716.) On May 9, 2007 the California Supreme Court issued an order to show cause returnable before the Stanislaus Superior Court for a hearing to determine why the relief prayed for in the petition should not be granted on the grounds that the prosecution failed to disclose material, exculpatory evidence, and that false evidence was presented at trial.

An evidentiary hearing was held in Stanislaus Superior Court beginning February 5, 2008. The court admitted documentary exhibits introduced by petitioner. These documents were claimed to have not been disclosed to defense counsel at trial. (These same exhibits are attached to the petition before this court.)

Contrary to the prosecutor's theory at petitioner's murder trial that Ybarra was testifying as a concerned citizen and received no benefits other than being placed in the witness protection program, petitioner claims that the first series of documentary exhibits shows that Ybarra received leniency and/or benefits for his testimony. Exhibit A is a handwritten note from the probation department's file noting that Ybarra was booked and committed for his 1988 theft with a prior theft conviction (hereafter theft conviction) on December 27, 1988, and released on December 30, 1988.

A June 6, 1989, report from the probation officer is exhibit B. The report states that Ybarra reported to the officer, his probation goals were discussed, and he signed his terms of probation. Ybarra was accompanied to the meeting by Alan Fontes, a criminal investigator for the district attorney's office. The probation officer noted that Fontes explained that Ybarra was released early from jail because he was in the "victim witness" program regarding a murder case. The business card of Fontes was attached to the report.

A probation department memo dated April 3, 1990, is addressed to a "court officer" and states that Ybarra was released on December 30, 1988, through the "Witness Assistance Program." The memo went on to note that this should not be stated in open

court if the judge asks why Ybarra was released so early. If there is a request to know why this occurred, the officer should provide the information in chambers. (Exhibit C.)

An "adult court worksheet" is exhibit D. It appears to have been prepared in June of 1991 and it states that nothing should be in Ybarra's probation report that he is a witness in the Padilla or Hernandez murder cases.

A "Stanislaus County probation adult court action sheet" is exhibit E and contains numerous entries regarding Ybarra's probation, ending with an entry on June 12, 1991, that he violated his probation. An entry dated December 27, 1988, states: "36 Months Formal Probation; 240 Days County Jail 15 Days Credit For Time Served 7 days Credit for Good & Work." It also stated his jail release date as December 30, 1988.

A handwritten note by a probation officer on January 15, 1990, states that no one was home during an attempted home visit. The next day a call was placed to Fontes to explain to him that if Ybarra did not report to the probation department his probation would be violated.[2] (Exhibit F.) Ybarra had a dirty drug test on January 23, 1990, and on January 26, 1990, the probation officer phoned Fontes and told him that Ybarra needed to see the officer regarding his dirty drug tests. (Exhibits G and H.)

In a supplemental probation officer's report filed April 17, 1990, the probation officer recommends that Ybarra's probation be revoked due to his dirty drug test. The report stated that one of the conditions of Ybarra's December 27, 1988, grant of probation was that he report in person to the probation officer within 14 days from his date of release from custody and that Ybarra reported on June 6, 1989. Under the section of the report listing incarceration information, the report states that Ybarra was committed on December 27, 1988 and released on December 30, 1988. (Exhibit N.)

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[2] Petitioner claims the date of this note is January 15, 1990. The copy of the note in the petition is cut off on the right margin and does not contain the month. Since there is no disagreement about the date we will assume it is January.

Ybarra's probation was revoked on June 11, 1990, and he was given credit for time served of 25 days. (Exhibit O.)

A probation officer's report dated January 7, 1991, indicates that Ybarra had been arrested since his last visit. Ybarra did not know if anything had been filed based on his new arrest and told the probation officer that Fontes was working on his new offense. Ybarra did not know if Fontes was going to make a deal with the police for him. Defendant was still testifying in the murder trials. (Exhibit I.)

On June 12, 1991, after the trial was completed in petitioner's case, Ybarra's probation was once again revoked on the theft case and he was sent to prison for that theft (1988) and two additional thefts committed in 1990 and 1991. He was given credit for time served of 59 days. (Exhibits P & Q.)

The final documentary exhibit in the series of documents that claim to show that Ybarra received benefits from testifying is a group of memorandums and receipts for money given to Ybarra from the district attorney's office in late 1988. On November 28, 1988, Fontes sent a memorandum asking for $60 to give to Ybarra so he could leave the area. Fontes described Ybarra as a material witness in the Padilla murder case. (Padilla was charged with and convicted of the same crimes as petitioner. Padilla was tried separately, almost a year before petitioner.) Fontes requested $150 for Ybarra on December 8, 1988, and explained that if the district attorney's office had to pay to keep Ybarra in a hotel and pay for his meals it would probably cost $75 a day. Fontes noted that they would not have a case against Padilla without Ybarra's testimony. The request was approved, and it was noted that the money was advance money for witness expenses "which may or may not need to be deducted for any claim he may file." A third memo, dated December 22, 1988, asked for additional money, noting that Ybarra has been unable to work because he has had to stay in the area in case he is needed to testify in the Padilla case. The request was approved, but only for $60. (Exhibit J.)

Exhibit K is a group of documents establishing that Ybarra acted as a confidential informant beginning in 1981. Petitioner claims these documents establish that Ybarra had a much more extensive history as a criminal informant than revealed at trial.

Exhibit L is a document dated March 2, 1988, showing that Ybarra acted as an informant in a drug case in February of 1988, after the murder.

When Ybarra was arrested on December of 1992 it was noted on his intake worksheet that it was believed that Ybarra is an "old 300" who "burned every chance he was given." A "300" is a term given to an informant. (Exhibit M.)

Testimony was taken at the evidentiary hearing on the order to show cause in superior court. Petitioner's trial counsel, Kirk McAllister, testified that part of his defense was to show at trial that Ybarra got a deal from the prosecution. McAllister testified that the above summarized documents were not disclosed to him during the discovery process prior to or at petitioner's trial. McAllister recalled that the district attorney claimed they had no agreement with Ybarra for special treatment in exchange for his testimony during petitioner's trial. (Exhibit R.)

Ybarra testified in petitioner's case and in the Padilla case. He testified at the hearing on the order to show cause that he did not receive any deals, favors, benefits or leniency for his testimony. Ybarra stated that he served his sentence on the theft conviction, having been first "locked up" in Stanislaus County and then transferred to Tuolumne County by the district attorney's investigator, Fontes, for security reasons. He said he was on felony probation after serving his eight-month sentence.

Ybarra was asked a series of questions regarding whether he was given money by the district attorney's office for his testimony and whether he testified falsely at trial that he did not receive any money. Ybarra said he did not receive any money for his testimony in petitioner's trial. The money he received in December of 1988 was after he testified at the preliminary hearing. It was not clarified if the money was related to petitioner or Padilla or both. Ybarra acknowledged he signed two receipts in December

for the receipt of money. He did not equate this as receiving money but as the district attorney's office helping him out with rent and other expenses. Ybarra testified that he did not get any money for petitioner's case. He did get money in the Padilla case for rent, gas, and transportation.

Ybarra acknowledged he had been an informant in 1981, 1982, 1984, and also in 1988 after the murder. His informant activities after the murder were an effort to get leniency for his brother's act of stealing the lawn mower.

Ybarra did not receive or expect any favors for his testimony in petitioner's case; he walked into the police department and told a detective what transpired the night of the murder. He did not recall exactly when he went to the police with his report, but he went voluntarily.

Fontes testified at the hearing that he did not give Ybarra money except the money he received through the witness protection program. Fontes said that any money Ybarra received prior to entering the witness protection program was expense reimbursement. Fontes arranged for Ybarra to serve his county jail sentence in Tuolumne County for Ybarra's protection. Although there were no documents to show that Ybarra served his sentence in Tuolumne County, Fontes testified that he knew Ybarra was there because Fontes went there and picked him up. Ybarra may have been released a few days early from his eight-month sentence, but he served the majority of his time in Tuolumne County. Fontes did not make any arrangements for Ybarra's early release. Fontes testified that to his knowledge no one from the prosecutor's office gave Ybarra money to testify for the prosecution.

The superior court also reviewed testimony from petitioner's trial in ruling on the order to show cause. The trial testimony of Ybarra (exhibit T to the petition) began with Ybarra admitting he was a convicted felon and had served an eight-month sentence for a theft with a prior theft conviction. He also admitted he used heroin and cocaine and was

using at the time of the murder. He had known the victim since they were young; at the time of the murder, they were still friends and did drugs together.

Ybarra explained that Prado and Padilla would not sell drugs to him because he had a record of being an informant. When petitioner showed up at the Lawson home (where Padilla and Prado lived), Ybarra hid because he was an informant with the Drug Enforcement Unit of Stanislaus County and he had set up the boyfriend of petitioner's sister. Ybarra testified against the boyfriend.

Ybarra stayed in hiding and watched the occupants of the house to see if he could discover where they hid their drugs. When asked why he wanted to know that, Ybarra responded, "I was a heavy user and I was a thief."

The death of the victim became known to Ybarra the morning after. He went to the police within two weeks at the most to answer questions about the stolen lawn mower, and then he eventually told them what he knew about the murder.

On cross-examination, Ybarra said he had used heroin since he was 17 years old (he was 34 years old at the time of trial) and had been addicted since 1984. He testified that he had been in the Lawson home almost every day buying drugs until they quit selling drugs to him. They quit selling drugs to him after he was arrested for the theft in 1987 that resulted in the theft conviction and learned that he was kept in protective custody after his arrest. He was allowed in the house a few times in 1987, but on each occasion he was strip searched when he entered. He did not work as an informant in relation to the theft conviction incident.

Ybarra was asked if he had been an informant before his arrest for the theft conviction incident. He replied, yes. He was then asked, "And when you had been an informant before was that in 1984?" He said yes. The next question was, "And it was in 1984 that you became an informant for the county drug enforcement unit. Is that right?" Ybarra said yes. He explained that he became an informant at that time because he had a

felony burglary charge pending against him. After he became an informant the burglary charge was dropped.

Ybarra admitted he had been convicted of petty theft four or five times, had been convicted of grand theft, and his latest conviction was a felony of petty theft with a prior (the theft conviction). He had charges currently pending against him for a September 1990 arrest for shoplifting. Ybarra said that in 1984 when he worked as an informer he had to work five cases to get the charges dismissed. He worked seven cases because he wanted more money to buy drugs. (Exhibit T.)

Fontes was asked at trial if he was aware of any efforts to do anything for Ybarra that involved financial considerations. He said yes. He was then asked if he was familiar with the witness protection program. He said yes and explained the program to the jury. Fontes testified that Ybarra became involved in the witness protection program in May of 1989 after he was released from county jail and had an altercation with his brother.

Fontes explained that the money from the witness protection program came through the sheriff department and the funds were disbursed to Fontes to monitor. The following questioning occurred. "Q. [Prosecutor] Again when you're doing these dealings what was the date?

"A. [Fontes] This was in June of '89.

"Q. Was there any participation of Mr. Ybarra in a Witness Protection Program before June of 1989?

"A. No.

"Q. Was there any money given to him either directly or indirectly to your knowledge prior to that time?

"A. No.

"Q. How were funds [disbursed] then if you say you monitored them?

"A. There were certain guidelines. He was allowed -- you were allowed to spend so much money in regards to food, utility and rent and incidental expenses. What I did

was -- is found a place, apartment for him to live in under an assumed name and I --" The questioning continued with questions about the witness protection program.

Fontes assisted Ybarra in obtaining a new identity by getting him a driver's license and Social Security card under an assumed name. Money was allocated for rent, groceries, supplies, utilities and incidentals. At the first of the month, Fontes would pay Ybarra's bills and do his grocery shopping for him. Ybarra would receive $75 a month for haircuts, newspapers, laundry, etc. Fontes performed these services for 11 months, beginning in June of 1989 and ending in May of 1990. Approximately $7,000 was disbursed for Ybarra during this time period.

Prior to Ybarra being involved in the witness protection program, Fontes arranged for Ybarra to serve his jail sentence in another county under an assumed name. He did not want Ybarra serving his jail sentence for his theft conviction in the same jail as the three defendants who were in custody for the murder. Fontes testified that for the theft conviction Ybarra got probation and jail time. Fontes said that Ybarra served "eight months," from December to May.

Fontes transported Ybarra back and forth to and from jail several times, but he never made any effort to get charges dropped against him or to get him out of jail on the theft conviction. Fontes did ask the jail to put Ybarra in a single cell and then called a judge to get Ybarra released from jail when he was arrested for another charge during the pendency of the murder charges. Fontes also accompanied Ybarra to the probation department a couple of times.

Fontes testified that prior to Ybarra entering the witness protection program Fontes did not promise Ybarra money and did not say anything to him that would cause him to think he might be able to get some money. (Exhibit U.)

Holly Berrett, a chief deputy in the district attorney's office, testified at petitioner's murder trial. She testified that Ybarra was not given any deals on the theft conviction in return for his testimony in the murder trials. The only consideration Ybarra

was given was that the district attorney's office would recommend that he be allowed to serve his time in another county under an assumed name.

On cross-examination, Berrett detailed Ybarra's prior record as including a misdemeanor arson conviction, a misdemeanor weapons offense, two misdemeanor receiving stolen property convictions in the 1980's, one prior petty theft conviction, and three other misdemeanor convictions. In addition, he had the 1987 felony theft conviction that was disposed of in 1988. All charges against Ybarra for the stolen lawn mower that occurred the day of the murder were dismissed because the deputy district attorney found that Ybarra was factually innocent. (Exhibit W.)

In closing arguments to the jury at petitioner's murder trial, the People agreed that Ybarra was an ex-felon, "doper" and a thief. But they argued that Ybarra "spilled his guts" early on without any deals. Ybarra was a friend of the victim, he did not ask for money before telling his story, and he did not ask for help with his pending charges. The prosecutor argued that Ybarra either told the truth or he made up the entire thing. The prosecutor then pointed out the strength of the evidence linking petitioner to the murder, and the fact that Ybarra and the bar owner saw the victim get into a car linked to petitioner at the bar late in the evening before she was murdered. The prosecutor acknowledged that Ybarra received $7,000 through the witness protection program, yet he had no expectation of anything when he initially told his story to law enforcement. (Exhibit V.)

Petitioner's closing argument to the jury emphasized that Ybarra got $7,000 in goods and services for being an informer in this case. Petitioner's counsel argued that Ybarra knew the system and knew how it worked. Ybarra was freed of criminal responsibility for the lawn mower theft and had avoided a state prison sentence. In addition, counsel argued that Ybarra had been arrested many times since 1988 yet he had only done a little bit of jail time. (Exhibit X.)

It was stipulated at the hearing on the order to show cause that the Tuolumne County Sheriff's Department purges its records after five years and does not have any records of Ybarra's incarceration. In addition, it was stipulated that the records from the Stanislaus County jail and the district attorney's office regarding Ybarra show no records of incarceration from December 30, 1988, to June 1, 1989. The release form on December 30, 1988 from the Stanislaus County jail has the letters "OC" and this stands for out of county. (Exhibit Y.)

The Stanislaus Superior Court denied the petition for writ of habeas corpus. (Exhibit S.)

Petitioner filed a petition for writ of habeas corpus in this court on July 16, 2008. We issued an order to show cause on March 13, 2009.

Discussion

The petition for writ of habeas corpus has two claims. One is that the prosecutor suppressed evidence favorable to the defense. The second is that the prosecutor presented false testimony to the jury.

In *Brady v. Maryland*, *supra*, 373 U.S. 83, "the United States Supreme Court held that a defendant's right to due process is violated when 'favorable' evidence that has been 'suppressed' by the prosecution is 'material' to the issue of guilt or punishment. The violation occurs even when the prosecution has not acted in bad faith and the favorable evidence has not been requested." (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1312.)

"The defendant must establish that the undisclosed information was favorable to the defense and that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. [Citation.] Such a reasonable probability exists where the undisclosed evidence 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citations.] Impeachment evidence, as well as exculpatory evidence, falls within the scope of *Brady*." (*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1063.)

"The California Supreme Court has also repeatedly stressed the focus upon the importance of the undisclosed evidence to the trial. In *People v. Pensinger* (1991) 52 Cal.3d 1210, the court explained *Brady* materiality as follows: 'Under the federal Constitution, "the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."' (*Id*. at p. 1272, quoting [*United States v. Bagley* (1985) 473 U.S. 667, 678].) In *In re Brown* (1998) 17 Cal.4th 873 (*Brown*), the court again addressed the standard: '[W]e turn to the question of materiality, for not every nondisclosure of favorable evidence denies due process. "[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with 'our overriding concern with the justice of the finding of guilt,' [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."' (*Id*. at p. 884, quoting *Bagley*, *supra*, 473 U.S. at p. 678.) '"*Bagley*'s touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."' (*Brown*, at p. 886, quoting [*Kyles v. Whitley* (1995) 514 U.S. 419, 434].) '"One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."' (*Brown*, at p. 887, quoting *Kyles*, *supra*, 514 U.S. at p. 435.) Recently, in *People* v. *Zambrano* (2007) 41 Cal.4th 1082, disapproved on a different ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22, the California Supreme Court reiterated the standard of materiality under *Brady*: 'Evidence is material [under *Brady*] if there is a reasonable probability its disclosure would have altered the trial result.' (*Zambrano*, at p. 1132.)

"The *Brown* court also explained, 'The sole purpose [of *Brady* and its progeny] is to ensure the defendant has all available exculpatory evidence to mount a defense. To that end, a document sent but not received is as useless as a document not sent at all. In both situations, the right to a fair trial is equally denied.' (*Brown, supra*, 17 Cal.4th at p. 881.) And in [*City of Los Angeles v. Superior Court (Brandon)* (2003) 29 Cal.4th 1, 8], the California Supreme Court stated that the materiality standard of *Brady* does not vary based upon when a *Brady* claim is raised: 'Although *Brady* disclosure issues may arise "in advance of," "during," or "after trial" [citation], the test is always the same. [Citation.] *Brady* materiality is a "constitutional standard" required to ensure that nondisclosure will not "result in the denial of defendant's [due process] right to a fair trial." [Citation.]'" (*Eulloqui v. Superior Court, supra,* 181 Cal.App.4th at p. 1067.)

"Penal Code section 1473, subdivision (b)(1) provides that a writ of habeas corpus may be prosecuted if '[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration....' [¶] 'False evidence is "substantially material or probative" if it is "of such significance that it may have affected the outcome," in the sense that "*with reasonable probability* it *could have* affected the outcome...." [Citation.] In other words, false evidence passes the indicated threshold if there is a "reasonable probability" that, had it not been introduced, the result would have been different.' [Citation.] 'The requisite "reasonable probability"' is 'determined objectively,' is 'dependent on the totality of the relevant circumstances,' and must undermine[] the reviewing court's confidence in the outcome.'" (*In re Cox* (2003) 30 Cal.4th 974, 1008-1009.)

Petitioner raises the same claims here that were previously raised and determined at the hearing on the order to show cause in Stanislaus Superior Court. He argues that Ybarra had a much more extensive history as an informant for law enforcement than the prosecution revealed at trial. He claims this information would have been material and favorable to the defense because having a pattern of serving as an informant before and

after the murder would make it likely that Ybarra served as an informant in this case as well. Next, petitioner argues that evidence was withheld that showed Ybarra did not serve his 240-day jail sentence, but served only four days. Petitioner asserts this information would have refuted the prosecution's claim that Ybarra did not receive any deals or leniency for testifying. The third item petitioner claims the People failed to disclose was that Ybarra received monetary payments from the prosecution in 1988, contrary to the testimony at trial by Fontes. Again, it is argued that this evidence would have been material and favorable to the defense by showing that Ybarra did receive favors or benefits for testifying for the prosecution.

"The 'petitioner in a habeas corpus proceeding has the burden not only of alleging but also proving the facts on which he relies in support of his claim for relief.'" (*In re Pratt* (1980) 112 Cal.App.3d 795, 862.) "[W]here the superior court has denied habeas corpus after an evidentiary hearing and a petition for habeas corpus is thereafter presented to an appellate court based upon the transcript of the evidentiary hearing conducted in the superior court" (*In re Wright* (1978) 78 Cal.App.3d 788, 801-802), the rules applicable to our review are the same as where we have appointed a referee to conduct an evidentiary hearing. These rules are well settled. "[T]he appellate court is not bound by the factual determinations of the referee but, rather, independently evaluates the evidence and makes its own factual determinations; the factual determinations of the referee are entitled to great weight, however, when supported by the record, particularly with respect to questions of or depending upon the credibility of witnesses the referee heard and observed." (*Id*. at p. 801.) "When a reference is made by a Court of Appeal, the referee appointed is customarily a judge of the superior court and, of course, the opportunity to hear and observe the witnesses is the same whether the judge is acting as a referee appointed by the appellate court or as a judge of the superior court." (*Ibid.*)

Petitioner asserts that we should not give deference to the superior court ruling because it failed to consider critical and uncontroverted facts and failed to consider the applicable law in establishing the materiality of the constitutional violations.

First, petitioner claims the superior court erred when it stated that petitioner does not have any direct evidence to show that Berrett, Fontes and Ybarra testified falsely by claiming that Ybarra served his full jail sentence. Petitioner claims the evidence he presented at the hearing established that Ybarra served only four days in jail and that his early release from jail was covered up. At petitioner's trial the testimony was that Ybarra's sentence for the theft conviction was served out of the county and under an assumed name. In addition, Fontes testified that for the theft conviction Ybarra received probation and county jail time. "He served eight months. I believe he went in December and got out in May and he was on a total of three years probation." In its ruling on the order to show cause the court failed to note this testimony from trial, but its omission from the court's ruling does not benefit petitioner; it establishes there was no cover up at trial and that Ybarra served his sentence in a different county jail.

While Fontes testified at trial that Ybarra served eight months, he described the eight months as a term from December to May. Thus the length of the sentence was not covered up at trial. We are confident that jurors were capable of calculating that December to May is not eight months. In addition, the fact that Ybarra's probation conditions required him to report to his probation officer within 14 days of his release from jail, combined with the probation officer's report that states he reported on June 6, 1989, to sign the terms of his probation following the release from jail, is strong evidence that Ybarra served his sentence as described by Fontes and upon his release reported to the probation department within 14 days. Also, it is clear that Ybarra sought money from Fontes on a weekly basis beginning in December of 1988 but after he went to jail there is no evidence Ybarra received any money until May or June, which would have coincided with his release from jail.

Petitioner claims the critical evidence not looked at by the superior court was the June 6, 1989, probation officer's report stating that Fontes explained Ybarra was released early from jail due to being in the "Victim Witness Program." Even if the court did not mention it in its ruling, the report is entirely consistent with Fontes's trial testimony that Ybarra received an eight-month sentence for the theft conviction, that he served it out of county, and that he served his sentence from December to May.

The fact that the Stanislaus documents show that Ybarra served only a few days in Stanislaus County does not demonstrate that there was false testimony at trial. The documents merely reinforce the evidence that Ybarra served his sentence out of the county and under a different name.

In addition, petitioner claims the court's ruling is factually inaccurate when it states that Ybarra testified at trial that he served his full sentence in Tuolumne County. Petitioner is correct that Ybarra did not testify he served his sentence in Tuolumne County; Ybarra testified he served his sentence in another county. This distinction makes no difference whatsoever.

We thus agree with the court in its ruling on the order to show cause regarding whether false testimony was given regarding the jail sentence Ybarra served for his theft conviction. We do so based on the reasons given by the trial court and for the additional reasons we previously noted.

Next, petitioner takes issue with the court's rejection of his claim that the prosecution presented false evidence of Ybarra receiving payments from the prosecution and the prosecution failed to disclose material evidence favorable to the defense on this issue. At trial Fontes testified two times that Ybarra was not given any money prior to entering the witness protection program. On both occasions this testimony occurred during questioning regarding the witness protection program. In addition, the documents discovered after trial indicate that the money given to Ybarra was asked for in connection with the Padilla case and was merely witness expense money. In any event, even if the

testimony of Ybarra and Fontes is characterized as false and the documents showing the payments were suppressed by the prosecution, petitioner has not shown that this evidence had any significant effect on the outcome. Fontes testified at trial that Ybarra received $7,000 through the witness protection program. In fact, Fontes actually went and purchased groceries for Ybarra using some of the money and personally paid Ybarra's bills. In addition, Fontes arranged for Ybarra to be housed in a different county to serve his jail sentence, obtained a new identity for him, arranged for Ybarra to be placed in a single cell and then released from jail when he was arrested after his release from jail on the theft conviction, and accompanied Ybarra to the probation department a couple of times. It was clear from all of this evidence at trial that Ybarra was being carefully monitored and his needs were being met under the watchful eye of Fontes. The jury would not have been influenced if it had learned that Ybarra received an additional sum of merely $310 after the murder and before serving his sentence for the theft conviction. We agree with the court's determination that the presentation of false testimony, if any, and suppression of evidence regarding payments made to Ybarra by the People was insignificant and would have not affected petitioner's jury trial if presented at trial.

The last area raised by petitioner as affecting the verdict relates to the documents showing that Ybarra was an informant prior to 1984 and Ybarra's testimony regarding his informant activities. Ybarra admitted to being an informant. He admitted that he asked for protective custody when he was in jail because he was an informant. He testified that he could not go to the Lawson house to buy drugs because they knew he was an informant. When questioned by petitioner's counsel, the questions regarding his informant activity were in the context of 1984 and his activities at that time. At trial Ybarra was asked if he acted as an informant as a result of his arrest for the theft that resulted in his theft conviction. He said he was not an informant at that time. Petitioner characterizes this as testimony from Ybarra denying any other informant activity. We do not read the testimony as such and do not find that Ybarra gave false testimony.

Even if it could be concluded that Ybarra gave false testimony or the People suppressed evidence regarding some of his informant activity, petitioner again has not shown that this evidence would have changed the outcome of his trial in any significant way. The jury was aware that Ybarra had previously acted as an informant on more than one occasion, that he continued to ask for protective custody because of his informant activities, and that the people in the Lawson house characterized him as an informant and treated him as such. In addition, the jury was aware that Ybarra was a drug addict, thief, and convicted felon. The additional evidence was not shown to be any different in kind than the evidence already before the jury.

Disposition

Petitioner's request that we take judicial notice is denied as moot. The petition for writ of habeas corpus is denied. The order to show cause is discharged as improvidently granted. This order is final upon filing.

_____
VARTABEDIAN, Acting P.J.

WE CONCUR:

_____
LEVY, J.

_____
HILL, J.